# ShortCircuit385

Mon, Aug 18, 2025 11:00PM 48:45

**SUMMARY KEYWORDS**

Sixth Circuit, criminal appeal, pyramid scheme, mail fraud, multi-level marketing, jury instructions, First Amendment retaliation, qualified immunity, Supreme Court, Eighth Circuit, Institute for Justice, appellate law, civil rights, legal practice, trial evidence.

**SPEAKERS**

Marie Miller, Kyle Singhal, Anthony Sanders

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A **Anthony Sanders** 00:10

Hello and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, July 16, 2025. We have a special guest today that I'm excited to share with you, who's going to be discussing a case from the Sixth Circuit about a criminal appeal he's worked on. We also have an update on a little edition of "Where Are They Now" from an IJ case, which itself is going to be a case we're going to discuss, and it's a victory for IJ as well. So we'll get to those in a little bit. First, an announcement. As I've teased the last couple of episodes, we are going to be at the Seventh Circuit Judicial Conference. We're not actually part of the Seventh Circuit Judicial Conference, but we're going to be holding a live podcast on the eve of it in Chicago on Sunday, August 17, at 7 p.m. Hopefully, our website with the info about the event will be up by the time this podcast is released, and it's in the show notes. If it's not yet, it will be shortly—just listen to a future episode. I'm excited to share that we now have a full panel for that Short Circuit Live. That will be me as the host, John Wrench, my Assistant Director at the Center for Judicial Engagement, and also two Chicagoans. One is Sarah Konsky, who is a professor at the University of Chicago and director of their Supreme Court and Appellate Clinic. The other is Chicago appellate lawyer Christopher Keeler, who is a longtime appellate lawyer in Chicago and for the Seventh Circuit. They will both be able to share their knowledge about the Seventh Circuit if you come to that Short Circuit Live, or of course, you can just catch it on the podcast later. So I look forward to seeing some of you there. Now, as for today's episode, I'd like to welcome my colleague, Marie Miller. Marie, last time you were on, we were talking about walking on the wrong side of the road and how that's a major serious crime in the state of Missouri—so serious that your client was maybe kind of charged with it, although we're not really even sure. Since you came on, we've had a ruling in the case you discussed. What happened?

M **Marie Miller** 02:48

That's right, so after we got the GVR from the Supreme Court, the case was remanded back to the Eighth Circuit. And what was a 2-1 decision against our client turned into a 2-1 decision in

favor of our client, so the case went back to the district court and can proceed.

A Anthony Sanders 03:09

That is fantastic news, and it's kind of a funny story how you got there and also what the court had to say- but we will discuss all that a little later in the episode. But first our special guests, so I'm very pleased to introduce to our short circuit audience, Kyle Singhal. So Kyle is a jack of many trades when it comes to appellate law, but he does a lot of criminal appeals and civil rights work. He earned his law degree from the George Washington University Law School. He also has clerked for two different judges on the Sixth Circuit. And he clerked alongside someone that listeners of short circuit will be familiar with, which is Keith Neely- an IJ lawyer who is actually going to be on next week's episode. So Kyle, welcome the Short Circuit. Tell us a little bit about yourself and what you do.

K Kyle Singhal 04:12

Well, thanks for having me, Anthony. It's great to be here. I clerked for Judge Danny Boggs with Keith Neely, and then John Bush was appointed in 2017. I clerked for him as well, and I teach appellate practice at the George Washington University Law School with Judge Bush, and we have a great time teaching that course. I've also taught a constitutional law seminar at the University of Louisville Brandeis School of Law. So that's the adjunct law professor hat. I also provide some bar exam tutoring. I work through some firms, some law schools, and privately for those who were unsuccessful the first time and need a little lift the second time around. But my day job is the practice of law. My office is based in Washington, D.C. I spend most of my time in Maine, where I am right now, or traveling to see whoever wants to be seen.

A Anthony Sanders 05:08

I see a pine tree behind you there. So it's a very Maine setup.

K Kyle Singhal 05:13

There is—so that's the new Maine flag, which is actually the old Maine flag that folks decided to readopt as the Maine flag. Sailing and lobstering are daily activities in the summertime. In terms of legal practice, the bulk of my hours are appellate work. Criminal appeals tend to be wire fraud. The civil rights work is fun. I've got a good Section 1983 suit right now—I always try to have two good 1983 suits. I've got some Bivens work, though you can't really call any of that good these days. I've also got a complicated Federal Tort Claims Act case that I'm litigating in the D.C. District Court, which will almost certainly be decided in the circuit. I really enjoy that work as well, though you can only do so much of it at a time. Apart from that, I do some district court post-judgment work, whether it's a Rule 60(b) motion on the civil side or sentencing work on the criminal side. I've also had some success in the clemency sphere, doing advising on applications for commutations or pardons. So that's it in a nutshell.

A Anthony Sanders 06:23

Well, out of that universe of practice that you have, we're going to take a little slice today, which is a Sixth Circuit appeal that was recently decided, and you are a lawyer for the defendant-appellants. It gets into some issues that we don't cover too much on Short Circuit. We do criminal appeals occasionally, but this comes down to something that I think most people in law school don't think too much about their importance, but that actually are hugely important when you get into criminal defense—and that is how you instruct the jury. Is that right?

K **Kyle Singhal** 07:00

Absolutely. The opinion begins with something like, this is fundamentally a case about a fraud scheme, specifically a pyramid scheme, which is how the case was briefed—as a pyramid scheme case. But the upshot of the opinion is that the panel says, I don't know why they bothered instructing the jury on a pyramid scheme in the first place. Why not just instruct the jury as a mail fraud case? And so that's what this shakes out as: the panel says, regardless of whether there's a pyramid or not, the jury could have convicted the defendants based on an ordinary definition of conspiracy to commit mail fraud. But I want to back up a second and explore the pyramid scheme theme. Egypt has pyramids of limestone—pyramids are spooky from the start. American pyramids are made of Mary Kay cosmetics, Amway supplies, and Tupperware. Depending on how you frame it, if you ask someone, have you heard of multi-level marketing, the reaction might be, oh, that sounds like a pyramid scheme. If you ask, have you heard of lawful multi-level marketing, they might think Mary Kay or Amway or Tupperware. And I think there's a general idea that those things are okay. Millions of people have probably bought from or participated in those product distribution systems. But if you ask, is a pyramid scheme legal, people look at you like you're asking whether genocide is good. You'd think there would be a bright line between lawful Amway-style multi-level marketing and illegal pyramid schemes, but this opinion illustrates that there's not. The panel's view is that in a specific case, and likely in others going forward, the government would be wise not to worry about whether something is or is not a pyramid scheme. If there are false representations made, just charge it as mail fraud. But in this case, the government's theory from the indictment to closing was that the defendants participated in and ran a pyramid scheme. I'll tell you more about what they did and what the allegations were, but first, I have to comment on the absurdity of the fact that it's 2025 and we're still talking about mail fraud. Who goes about their day worrying about mail fraud? If you look back, the first true mail fraud statute was in 1868. Some folks were concerned, and Congress passed a law making it illegal to "deposit in a post office to be sent by mail, any letters or circulars containing lotteries, so-called gift concerts, or similar enterprises offering prizes of any pretext whatsoever." Back then, maybe you'd get something in the mail that sounded like a good idea, and you'd send a dollar or two and hope you got what was promised. I can even recall in early childhood seeing catalogs where you might send money sight unseen and hope you got something back. We don't do that anymore in 2025, and yet the vast majority—if not all—of the federal fraud prosecutions come under either the mail fraud or wire fraud statutes, or the adjacent health care fraud or bank fraud statutes. The title of the mail fraud statute itself is "Frauds and Swindles." I love the word swindle. Nothing like being a swindler for Halloween—spooky, kind of like pyramids. Swindlers.

A **Anthony Sanders** 10:47

Does the actual text of the mail fraud statute still today require use of the US mails? I'm guessing it's been expanded to email or other ways of using "interstate commerce."

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K Kyle Singhal 11:00

Every indictment charging mail fraud, rather than wire fraud, requires an act where something was actually put in the mail under 18 U.S.C. § 1341. The interstate commerce expansion is the wire fraud statute, 18 U.S.C. § 1343, but with wire fraud you usually see phone calls and emails, as opposed to something more general like a website. So typically, the overt act in a conspiracy case will be something like, "on this date somebody got a check in the mail." That's the setup here. One thing you ought to understand about multi-level marketing is that multi-level marketing people truly are multi-level marketing people—it's a lifestyle. It's cultish, energetic, entrepreneurial, and very American. Even with Amway, which the opinion in a footnote calls the "best example of a lawful multi-level marketing program," the majority of people make nothing, and the average earnings among those who do make something is under $100 a month. People either know or suspect that, and yet they're drawn to these programs because everyone hopes they'll be the one to hit it big. The people at the top become very wealthy and flash checks, showing off their success. It's the American dream of social mobility and finding a way out. The defendants in this case came from that world—none of them woke up one day and decided to "try a pyramid." They had all been doing multi-level marketing for years with varying degrees of success. So, wind back to 2013. The three defendants on trial were Rick Maike, Doyce Barnes, and Faraday Hosseinipour. Together they formed a company called I2G, Infinity 2 Global. Their three main selling points were: (1) "The Touch," a program that was supposed to integrate video streaming, social media, and email—a kind of Zoom 1.0 before Facebook Live, based loosely on a free program called Qube; (2) "Songs2Gram," a karaoke app where you could record and share vignettes of yourself singing; and (3) an online casino, which became the focus of the case. In 2013, lawful online gambling wasn't available in the U.S., so the idea was to target overseas gamblers. Memberships were sold at different tiers, from a basic level up to "Emperor," which cost $5,000. Only Emperors got a share of casino profits, and the promise—which no one alleges was broken—was that there would be at most 5,000 Emperors. That meant the Emperors would all share equally in the casino profits. Marketing included video calls with pitches like, "Come get your share of the $150 billion gambling pie." The structure was that 5,000 people would each pay $5,000—$25 million right away—and could then earn commissions by recruiting others at any membership level. Within months, a lot of money came in. The allegations were that defendants made false statements about profits and about who was backing The Touch and Songs2Gram. From a simple mail fraud angle, the question was: were false statements made in selling these memberships? The government also alleged that this was a pyramid scheme. Courts like the Sixth Circuit have said in the past that a pyramid scheme is one destined to collapse—a close cousin of a Ponzi scheme. A Ponzi uses new money to pay old investors. A pyramid overlaps, because the further down you go, the more people must be recruited to generate revenue, which is passed up to earlier members. Most unlawful pyramids are really subsets of Ponzi schemes. At trial, the government even used a pyramid chart on the courtroom screens, showing exponential growth—2, 4, 8, 16—and you could just sit there practicing your powers of two while waiting for the next exhibit. The Sixth Circuit's key precedent is Gold Unlimited. There, the scheme was selling $800 in gold, but you could pay $200 down and get commissions for signing up others who also put in $200. Eventually, you could cover your $800 just through commissions, which only worked if no one ever actually claimed the gold. The court held that it was destined to collapse because the gold wasn't worth $800 and the commissions made the model unsustainable. So, was I2G's casino a pyramid scheme? The government argued yes, because the 5,000 emperors earned commissions and once you hit 5,000, no new recruits could join. The defendants argued no,

because everyone knew it was capped at 5,000 emperors, and in fact, none of the witnesses who came to testify at trial for the government testified that they even cared about the recruiting; they just wanted to earn the income from their share of the casino profits. The defense theory was that this had many features of multi-level marketing, but it lacked the essential element of a pyramid scheme because nobody was even trying to recruit—at least none of the government witnesses were. Yes, when recruitment happened, commissions passed upward, and that's true. But in looking at the case through the previous cases, like the Gold Unlimited case, it lacked the risk of saturation—the risk of running out of recruits—if, in fact, the government had to prove that there was a pyramid scheme. That might have mattered. But at the end of the day, what the panel says is Congress has never made pyramid schemes themselves unlawful. The indictment wasn't charging, as a statutory matter, the conspiracy of a pyramid scheme; it was charging mail fraud and mail fraud conspiracy, and there was enough evidence here to support the guilty verdict. There were other issues raised about whether it was unconstitutional to charge a pyramid scheme in the indictment and then sort of change the theory to one of more general mail fraud halfway through, and Judge Nalbandian writes a fairly lengthy concurring opinion exploring that but ultimately concluding that any potential variance was harmless in that respect. The takeaway, I think, if you're in business, is be careful about what you say and what you do, because the sort of ordinary puffery—"come get your share of the gambling pie"—that might not ordinarily be charged as fraud, was a highlight in the government's case here, and because the Sixth Circuit had previously held that pyramid schemes were sort of per se schemes to defraud under the mail and wire fraud statutes, it made it easier for the government to win its case. One line from the opinion stands out. I think it's a little curious. I don't think it was material in this opinion, but I can see it being quoted down the road. The majority opinion says, in the context of articulating why the jury could have made an inference that there was proof of conspiracy to commit mail fraud: "Two robbers who enter a bank from different entrances, for example, presumably do not do so by coincidence." I say it might be okay for a jury to infer that if the question is whether there was sufficient evidence, but I don't know that it's right to say that that's the presumption, if the presumption is innocence unless the elements are proven beyond a reasonable doubt. So I'm curious to see how that line is used in other cases outside the pyramid scheme context.

A Anthony Sanders 23:30

Marie, your thoughts on reading this case?

M Marie Miller 23:32

Yeah. Kyle, I'm interested- what do you think this decision did to Gold Unlimited? Do you think it kind of entrenches it more or heightens the standard. What do you think this is?

K Kyle Singhal 23:48

I think it minimizes Gold Unlimited and, in a sense, reads it away. The court says there was no reason they needed to charge a pyramid scheme; they happened to say some words about it, but since they also charged mail fraud, let's just ignore the pyramid scheme dimension and affirm the convictions on that ground. One of the points of Gold was that a defendant in these

circumstances might have the right to an anti-saturation instruction—that is, the jury could be instructed that if the company had measures in place to prevent collapse, then that could serve as an affirmative defense. Such an instruction was proposed here but not given. It was one of the primary issues on appeal, and the court's response was that no anti-saturation measure can cure the misrepresentations. What this effectively does, I think, is limit Gold to cases where the government is relying solely on the pyramid-scheme theory, without any allegation of a misrepresentation. If the government goes forward on a strictly per se pyramid theory, they can't prove anyone said something false; all they can prove is that the structure is doomed to fail, and people are therefore implicitly duped—not by any express promise of profits. But here, the bad spreadsheets and sound bites were things like, "We made X dollars in profits this month," when those figures were overstated. The panel's reasoning seems to be: the government had evidence of a misrepresentation, and that was enough to affirm. There's no need to worry about the application of Gold Unlimited to a true pyramid-scheme case.

M Marie Miller 25:41

And I was also interested in your thoughts about Judge Nalbandian's theory that the defendants had argued that the government had presented this erroneous legal theory about an emperor only capped pyramid. And he goes on to say that it's harmless anyway. But how much of the trial was focused on that Emperor only capped Pyramid?

K Kyle Singhal 26:08

The government had an expert on pyramid schemes, right? So this sort of cuts against the narrative that this wasn't really a pyramid scheme case. The government had an expert come testify about the evils of multi level marketing and what makes them pyramid schemes, and how this was, in fact, going to be a something that collapsed. So in my view, it was a large part of the trial. Now, to be fair, there were other sub counts, there were securities fraud issues and tax issues that also occupied a lot of time in the trial. But in terms of the primary focus, the mail fraud conspiracy counts and proving it was a pyramid was a large part of the case.

M Marie Miller 26:45

So from the jury's perspective, they would have seen the pyramid scheme allegations as prominent?

K Kyle Singhal 26:54

Absolutely. Until you get to the jury instruction. If you look at it, you've got—like often happens—a modified version of the pattern instruction. The pattern instruction on mail fraud is pretty straightforward: you knowingly participated in a scheme to defraud that involved a material misrepresentation, you had the intent to defraud, and you used the mail. So: scheme, misrepresentation, intent, mail. If it had ended there, it might have been fine. But what happens next is the court adds a lot more, after days of back-and-forth colloquy. The court says: okay, that scheme to defraud includes the following. It basically restates the elements—scheme, misrepresentation, intent—and then adds a very broad definition of what a pyramid

scheme is. It says a pyramid scheme is anything where the focus is on recruitment rewards or promoting interest in the venture. And then, in the defense view, the kicker is this line: “a pyramid scheme constitutes a scheme or artifice to defraud.” So if you’re on the jury, you can go straight to that paragraph—2(b)—and ask: did we have a pyramid scheme here? Did this venture focus on recruitment and promotion rather than products? If yes, then you can short-circuit the rest of the fraud elements. Judge Nalbandian pushes back. He says, no—that paragraph only lets the jury shortcut the first element (whether there was a scheme to defraud), not the others: whether there was a material misrepresentation or whether the defendant had fraudulent intent. But I think the instruction is fairly ambiguous. A juror, especially someone encountering multi-level marketing for the first time, could easily be unclear on what’s really necessary or sufficient for a guilty verdict. The panel, though, disagreed.

A Anthony Sanders 28:59

Well, I think we've discussed on the show before, how jury instructions are much more in theory than how the minds of jurors actually work, right? And so I think any juror who has sat through that trial, I'm guessing, is thinking, is this a pyramid scheme? If yes- guilty!

K Kyle Singhal 29:20

If I were sitting there, that's what I would be thinking, absolutely.

A Anthony Sanders 29:26

In my eyes—and having done almost no criminal defense—reading this and hearing what you have to say, essentially, this is a mail fraud prosecution. The pyramid scheme label is just a sexy way to dress it up and get the jury on board. They even put a pyramid in the background of the visuals for the jury to see day after day. So is it harmless error to just keep repeating “pyramid scheme” when it’s really about mail fraud?

K Kyle Singhal 30:01

Right. I think ordinarily, if you took the case law out of it— maybe so. If you took the case law and this jury instruction out of it—and just said, look, we call it a Ponzi, call it a pyramid, whatever you want to call it, that happens all the time in fraud prosecutions: bait-and-switch, whatever term gets people’s attention. But when that term adopts a secondary definition that doesn’t require proving all the elements of the mail fraud statute, then you might have a problem. Multi-level marketing is such an American thing; I doubt Congress is ever going to clearly prohibit it. But it would be nice for those involved in multi-level marketing if Congress provided clear guidelines, rather than relying on FTC opinions or cases like this, about where the line is and what parameters ensure that people don’t inadvertently run afoul of the mail fraud and wire fraud statutes.

A Anthony Sanders 31:07

Anthony Sanders 31:07

Well, there may be more briefing at a higher level in this case, so we will keep our audience abreast if that happens down the road. But appreciate it, Kyle for you sharing this with us. We're going to turn now to the latest in our ongoing saga of a fellow walking down the road in Missouri. And so we'll turn to Marie.

M Marie Miller 31:33

Thanks, Anthony. So Short Circuit listeners may remember this case—let me run through the facts quickly. Our client, Mason Murphy, was walking on the right side of the road in Missouri, which is generally prohibited; you're supposed to walk on the left side in most circumstances. Usually, this law isn't enforced with arrests when someone is otherwise behaving lawfully, but Mason was arrested for it. The officer approached him in his vehicle, stopped him, and said he did so because he didn't want Mason walking down "his highway." Mason challenged the officer's authority to stop him and refused to provide identification, saying he had no legal obligation to do so. The officer and Mason went back and forth for about ten minutes, after which the officer handcuffed Mason, placed him in a police vehicle, and took him to jail. At the jail, the officer called a supervising officer—who is now the police chief—asking what crime Mason could be held for, essentially admitting he didn't know what crime he could pin on Mason. The supervising officer came up empty and suggested calling the prosecutor, who also couldn't find a charge. There were no outstanding warrants for Mason. So they hold him for two hours, the officers released him without charges. Mason then sued, alleging he was arrested in retaliation for exercising First Amendment rights—asking questions and refusing to identify himself constituted protected activity. After the lawsuit, the officers noted a law prohibiting walking on the right side of the road, asserting that this provided probable cause, which normally would defeat a First Amendment retaliation claim. A First Amendment retaliation claim in the arrest context generally has four elements: the person engaged in protected activity; the government took adverse action sufficient to chill a person of ordinary firmness; the action was at least partly motivated by the protected activity; and there was generally no probable cause. But in Nieves v. Bartlett (2019), the Supreme Court carved out an exception: the lack-of-probable-cause requirement does not apply if the plaintiff can show objective evidence that similarly situated people were not arrested for the same conduct absent the speech at issue. Essentially, you have an exception to the no probable cause requirement if you can show that other people are doing the same thing and they don't get arrested, then your First Amendment retaliation claim can go forward. The district court initially found Mason didn't fit this exception. The case went to the Eighth Circuit, which affirmed 2–1. The original panel was per curiam with Judges Melloy, Kobes, and Grasz, with Grasz dissenting. We petitioned the Supreme Court in May 2024 after it granted certiorari in another IJ case, Gonzalez v. Trevino, which raised overlapping issues. So while Gonzalez was pending at the Supreme Court, we had petitioned the court to hear Mason's case and said, look, these issues overlap. You should either grant vacate remand in light of Gonzalez, depending on how Gonzalez comes out, or just grant the petition. Next, the supreme court issues the decision in Gonzalez and grants, vacates and remands Mason's case back to the Eighth Circuit. Okay, so then when the case goes back to the Eighth Circuit, the lineup of judges has changed. Judge Melloy took inactive senior status while the case was up at the Supreme Court, and so Judge Melloy is replaced by Judge Kelly.

A Anthony Sanders 31:33

So not just senior status, but inactive senior status.

M Marie Miller 31:33

Yes- inactive senior status is what-

A Anthony Sanders 37:02

That's really interesting, because I was talking to John wrench of IJ earlier today, and we were talking about different Judge's on inactive senior status. And I frankly wasn't sure what that meant. But essentially it means you don't want to fully retire, but you also are getting up there in years, and so you don't want to take any cases anymore. I guess they probably just have the title still and little else.

M Marie Miller 38:08

I wasn't familiar with it either.

A Anthony Sanders 38:13

But in any case, not taking cases anymore.

M Marie Miller 38:15

And in any case, he's not on the panel anymore, right? And so Judge Kelly replaces him, and before we had petitioned to the Supreme Court, Judge Kelly had had voted to rehear the case en banc. And so back on remand, we've got a different lineup with Judge Grasz and Kelly.

A Anthony Sanders 38:40

So that's a pretty good draw, i'd say

M Marie Miller 38:43

Yes. Judges Grasz and Kelly. Grasz had dissented previously, and Kelly had voted to rehear en banc before the GVR. After the GVR, Judges Grasz and Kelly formed the majority, with Judge Kobes dissenting. This is no longer a per curiam; Judge Grasz wrote the majority opinion, and Judge Kobes filed a dissent. The majority opinion makes a lot of sense. Judge Grasz explains that Mason has alleged he can provide evidence showing that officers usually don’t arrest people for walking on the wrong side of the road, and he supports this with video evidence showing the officers struggled to identify any crime to charge. Common sense suggests officers wouldn’t struggle if it were a typical offense they regularly charge. The video includes the arresting officer asking what he can pin on Mason and others saying, “I don’t know, call the prosecutor.” Even if the allegations aren’t highly detailed, they indicate there could be

objective evidence that similarly situated people aren’t arrested when they don’t challenge an officer’s authority. Judge Grasz concludes there is no qualified immunity on the First Amendment retaliation claim and addresses another issue still alive on appeal. Judge Kobes sticks to the former majority opinion, arguing the allegations are too conclusory and should fail under Twombly/Iqbal. What is difficult about his opinion, is that it’s hard to imagine how a plaintiff could allege a First Amendment retaliatory arrest, since plaintiffs usually lack access to evidence of non-arrests without deposing officers.

A Anthony Sanders 41:19

Even if you did a FOIA, the FOIA is just going to say, we don't have anything for you. Right?

M Marie Miller 41:25

Right. You could imagine depositions of officers asking, “How often do you charge people with this? How often do you see it?” So there can be evidence in discovery, but you don’t get discovery before filing the complaint. How do you get past the motion to dismiss phase otherwise? Unless you can make allegations like Mason did. That was Judge Grasz’s main point: at the motion to dismiss stage, you have to draw all reasonable inferences in the plaintiff’s favor and recognize that plaintiffs don’t have access to discovery before filing. These allegations aren’t implausible, especially given supporting evidence like the video showing the officer struggling to come up with a pretext. So that's where we are at. The upshot is the case was reversed and sent back to the district court, so the claims get to go forward.

A Anthony Sanders 42:39

So that means that it can go to discovery and then hopefully summary judgment on the merits.

M Marie Miller 42:45

Yes, it gets to go forward. It's not just a re evaluate qualified immunity. It's no qualified immunity on these pleadings.

A Anthony Sanders 42:56

Kyle, I imagine you have done some First Amendment work and tried to thread some of these needles.

K Kyle Singhal 43:03

Yeah, I don't know that I've had a First Amendment retaliation like this. But I've got a first amendment that I just filed in the First Circuit. I'm thinking about what the next step is on this exception to the probable cause rule- does the county have to prove that there was no actual

or arguable probable cause, or do they actually have to prove that the lack of other arrests of similarly situated people was not pretextual? Or is that lack of arrests enough to just make that element not apply at all? What's the issue?

M **Marie Miller** 43:40

Well, generally, just as a matter of the legal framework, once you get past the Nieves no probable cause exception, you go into the mount healthy framework. But I'm not sure I think this could possibly come back up at summary judgment for a showing of the objective evidence.

K **Kyle Singhal** 44:07

It seems like in any event, you probably have a good case that there was no actual or even arguable probable cause based on what they wrote in the opinion, right? But it would be, I guess, better for you if you could simply show no one else in these circumstances gets arrested.

M **Marie Miller** 44:25

Right.

K **Kyle Singhal** 44:26

If that were enough to win, that'd be great.

M **Marie Miller** 44:29

Probable cause was conceded.

K **Kyle Singhal** 44:31

Okay, so you're not fighting that battle. Your battle is just to prove that this is contextual.

M **Marie Miller** 44:38

Right, that it fits within that Nieves exception, the carve out. Sometimes it's called the jaywalking exception, because the court used that example. Lots of people jaywalk and aren't arrested. It's hard to imagine a closer scenario than what Mason did here, walking along the road instead of across it.

A Anthony Sanders 45:00

And it's really even more minor than jaywalking, because, like we discussed last time you were on- I literally did not know that this was a crime in many states to walk with the traffic instead of against the traffic. And that is just because no one ever charges it.

M Marie Miller 45:18

Right. I mean, you're not even going out into traffic.

K Kyle Singhal 45:24

Was this a divided highway or just an undivided road?

M Marie Miller 45:29

It was an undivided road, one lane each direction, but it had a large shoulder on each side.

K Kyle Singhal 45:34

I mean, growing up in Texas, everyone knew not to walk on the divided highway. That would just be absurd. But, you know, there were signs. No animals, no people, no pedestrians. But it just sounds like a road with a highway number, that's what people do. We walk along roads.

A Anthony Sanders 45:35

One final quirky thing that is interesting in the facts is they also threatened to charge him with not giving his identity. But it turns out that is not a crime in Missouri, to not give your your name when an officer asks.

M Marie Miller 46:06

Right. Sometimes it is, and sometimes it isn’t—the officer needs a reasonable basis to demand identification, depending on why the person was stopped. Here, even if the officer knew walking on the wrong side of the road was a crime, that alone wasn’t enough to demand identification. I mentioned earlier that the person that the arresting officer called is now the police chief. Interestingly, in May, that police chief issued a statement trying to explain the situation, noting that the arresting officer was part-time and resigned after the incident, that the department is under new leadership, and does not condone this behavior. A curious detail is that the letter does not mention that he was the person called during the incident who couldn’t come up with a crime.

A Anthony Sanders 47:19

Well, the plot thickens. So we'll see how that does on remand. So Institute for Justice is not actually going to be part of the remand. Is that right? But of course, we'll be wishing our co-counsel well and see what happens there.

M Marie Miller 47:35

Right. The original counsel is handling the case at the district court level.

A Anthony Sanders 47:41

Okay, great. Well, we will, as I said, see how that goes. We will see how things go for for Kyle as well. Kyle, thank you for joining us on Short Circuit.

K Kyle Singhal 47:51

Thank you for having me. I had a great time.

A Anthony Sanders 47:53

And thank you to everyone else. I'll close by saying we hope to see some of you in Chicago, as I said, on August 17. And Marie is going to be at that same conference in Chicago. So not only would you get to meet myself and John Wrench of IJ, but also Marie. And so please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify, and on all other podcast platforms. And remember to get engaged.